

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE MICROSOFT CORP.
ANTITRUST LITIGATION.

This Document relates to:

Burst.com, Inc. v.
Microsoft Corp.,

Civil Action No JFM-02-cv-2952

MDL Docket No. 1332

Hon. J. Frederick Motz

**BURST.COM, INC.'S MOTION FOR
ADDITIONAL TIME TO DEPOSE
WILLIAM H. GATES, III**

[UNDER SEAL]

I. INTRODUCTION.

Microsoft initially refused to produce Mr. Gates for deposition. It argued that Mr. Allchin, not yet deposed, was the more knowledgeable witness, because he was “intimately involved in the relationship with Intel.” February 6, 2004 Hearing Tr. at 40. Microsoft also said that Mr. Gates had no “unique knowledge” about the Intel relationship in the time period most relevant to Burst, the “1997 to 1998 period, after the end of the Government story [DOJ case].” *Id.* at 41. On this record, the Court struck what then appeared to be a fair compromise, giving Burst three hours with Mr. Gates in total. *Id.* at 44.

Four things have changed since this argument. First, when Burst deposed Mr. Allchin, he specifically denied *any* knowledge of Intel’s relationship with Microsoft. Instead, he repeatedly referred counsel to Mr. Gates. *See, e.g.,* Exhibit 1, June 17, 2004 Allchin Tr. at 105 (“You’ll have to ask Bill.”); 106 (“Again, you’ll have to ask Bill.”); 106 (“I don’t have knowledge of it... again ask Bill.”); 114 (“You’re going to have to ask Bill. I don’t know.”) (all on Intel).

Second, e-mails (including many produced after the hearing on Burst’s motion to compel Mr. Gates’ deposition) proved Mr. Allchin right – Mr. Gates was not *a* witness on the Intel

relationship, he is **the** Microsoft witness. No one is more personally involved than Mr. Gates. And this is particularly true for the period when Microsoft claimed he had no involvement, the critical "1997 to 1998 period." See § II below.

Third, Microsoft now says that it is willing to concede only thirteen DOJ case findings in this Burst case. While the parties have agreed to adopt the Court's suggestion that the collateral estoppel issue be deferred until after summary judgment,¹ Microsoft now takes the position that Burst should not reopen discovery after the ultimate collateral estoppel decision if needed (contrary to the Court's suggestion).² Microsoft instead insists that Burst do all of its discovery now, yet refuses to produce the key witness for more than three hours. This is just not fair.

Finally, Burst deposed Mr. Gates last week. Burst counsel spent almost all of the allotted three hours on the Intel issue alone. This was not inefficiency, but rather an approach required both by the importance of the topic and the frequently unresponsive nature of the witness' answers. Some questions had to be put three or four times or more, with the witness often answering questions other than the ones asked. See below § III. For this reason, an examination that should have lasted an hour or perhaps two took a full three. As everyone in that conference room knew Burst had just three hours, there may well have been some connection between the witnesses' unresponsiveness and the fixed time allotted.

For these reasons, Burst respectfully requests that it be given an additional two hours with Mr. Gates. Described in § IV below are the critical topics remaining. This would amount to a total of five hours, still fewer than permitted by the federal rules. For a key witness in an important case, and a witness Microsoft will not produce at trial, this seems reasonable.

¹ A suggestion advanced by the Court at the July status conference.

² Compounding the uncertainty, Microsoft also takes the position that the summary judgment motions and the collateral estoppel motion should be decided by Judge Walker in California, under some early or partial remand theory.

II. MR. GATES INDEED HAS “UNIQUE KNOWLEDGE” ABOUT MICROSOFT’S RELATIONSHIP WITH INTEL PRECISELY DURING THE TIME MOST RELEVANT TO THIS CASE.

A. Mr. Gates Personally Compelled Intel To Drop Work On JAVA And Competitive Network Computers.

In late March, after the February hearing on whether Microsoft had to produce Mr. Gates, Burst served a motion to compel additional documents relating to Microsoft’s relationship with Intel. On May 4, Microsoft produced additional documents. Some of the documents are quite important, and 8 of the 26 Intel related exhibits Burst used at the Gates deposition came from this post-February production. With the old and new documents together, the following facts emerge:

In late 1996 and 1997, Mr. Gates grew very concerned that the JAVA OS coupled with network computers (“NC”)³ would replace the standard Windows PC. See, e.g. Exhibit 2, Gates to Aaron Contorer, Monday, September 30, 1996, (“This scares the hell out of me” re JAVA client application codes); Exhibit 3, Gates to Ben Waldman, Friday, November 7, 1997, (“JAVA is the biggest threat to us....”). Mr. Gates personally understood that NC’s running JAVA OS presented “platform challenges,” and threatened the “possible emergence of a set of API’s and underlying system software that lead to a lesser or no role for Windows.” See Exhibit 4, “overview slides for Billg/NC & JAVA session with 14 +’s [senior Microsoft employees],” January 5, 1997. By April 1997, very senior Microsoft executives internally described the JAVA NC threat as the “biggest competitive threat since [Microsoft’s] inception.” See Exhibit 5, FY98 Planning Memo, Jeff Raikes, copied to Bill Gates and Steve Ballmer. As that memo summarized:

If the NC is successful, it will mean a catastrophic downside in

³ A network computer is a simplified terminal with limited functionality linked to an intelligent server.

Windows revenue, our server business, our tools business, and our applications business – **i.e. NC's threaten the heart and the body of our company.** This is more than just an OS battle. This is about Windows clients, Windows servers, Windows tools, and Windows applications. **If Microsoft technology is relegated into "yesterday's technology" in lieu of the JAVA operating environment and JAVA apps, Microsoft loses.**

Id. at 2, MS-CCPMDL 221233 (emphasis added).

Mr. Gates and others at Microsoft were particularly incensed that Intel was actively supporting JAVA and non-Microsoft based network computers. Microsoft appreciated that Intel was a serious company with serious resources and the ability to propel JAVA NC's forward. See, e.g., Exhibit 6, Kate Seekings to Engstrom and others, (noting press reports that "Intel's foray into JAVA development may result in a crop of Intel-based network computers running native JAVAOS and applications....").

This concern led to a series of face-to-face meetings between Bill Gates and Intel's CEO Andy Grove, along with numerous phone calls and several e-mail flurries. The process began in early February 1997, when numerous Microsoft executives met with Intel. In Microsoft's summary of that meeting, as sent to Mr. Gates, Microsoft noted that MM [multimedia] Libraries [JMF] was "the area of most contention since Intel does not see their work with Sun and others as bad for the overall PC space, only as good for Intel." See Exhibit 7, Maritz to Brumer, Contorer, and Gates, February 5, 1997 at MS-CC-BU 372452. Several weeks later, Mr. Gates hosted a "multimedia offsite" with senior Microsoft executives, where Mr. Gates provided the following "direction":

We need to close the Intel issue – preferably with Intel as our key partner. However, we cannot give in to Intel and allow them to ship Talisman [Microsoft] technology on non-Windows systems. **Key issue is preventing Intel to use Talisman [Microsoft media graphics technology] w/JAVA VM [Virtual Machine].**

See Exhibit 8, Deborah Black to Allchin and others, February 19, 1997 (emphasis added).

Just after this “offsite,” and in preparation for a phone call with Mr. Grove, Microsoft’s Marshall Brumer summarized the Intel problem for Bill Gates:

At a hi-level, we are most concerned that Intel is helping one of **OUR** strongest competitors by supporting a scheme **that allows for Windows to be replaced by JavaSoft** work and then subsequently allows Intel’s x86 to be replaced by Sun CPUs for JAVA.

See Exhibit 9, Brumer to Gates, February 24, 1997 (initial emphasis in original; second emphasis ours). See also Exhibit 10, Gates to Allchin, February 20, 1997 (“If Intel has a real problem with us supporting this [Intel competitor AMD project] *then they will have to stop supporting JAVA Multimedia the way they are*. I would gladly give up supporting this if they would back off from their work on JAVA which is terrible for Intel. I have a call with Andy on this topic coming up on Monday.”) (emphasis added).

Mr. Gates had that call with Mr. Grove on Tuesday, February 25, 1997:

I called Andy today to talk to him about our sensitivities about JAVA and asking what goal Intel has in working on JAVA.... He said Gelsinger [senior Intel executive] made an offer when they went through what they were doing to have us tell them what they should be doing and that Ludwig [Microsoft] had not said anything in response... Andy’s offer was that he would get his best people together (3 to 4 total) and we would do the same and we could sit and talk about what is going on.... Andy agrees that JAVA could strengthen IBM, Sun and others a lot and weaken both of us....

See Exhibit 11, Gates to Maritz and others, February 25, 1997.

Mr. Gates continued to speak personally with Andy Grove about Intel’s work on JAVA.

On Tuesday, April 8, 1997, the two met again personally, as Mr. Gates reported back:

Intel is glad to talk to us about JAVA... Intel feels we have not explained where “JAVA on Windows” is better and different than the generic JAVA story. **Andy asked where we were drawing the line and deviating on runtime issues** [e.g. OS] and I said we

were not well organized on this yet.

See Exhibit 12, Gates to Maritz and others, April 9, 1997 at MS-CC-BU 203558 (emphasis added).

Mr. Gates continued to be very concerned about Intel's work on JAVA in May. In internal mail directed to senior Microsoft executives, Mr. Gates added what he characterized as "barbed comments" about Intel's "cross platform" work:

The JAVA platform is the greatest threat to us so I want to make sure they don't benefit from any of our work and that we stay way ahead of them. We will **NOT** be doing **Open JAVA** animation or graphics work despite what the cross platform promoters want us to do.

See Exhibit 13, Gates to numerous executives, May 13, 1997 at MSS 5054776 (emphasis in original).

Through the summer and into the fall, Intel continued to work on its JAVA initiatives, as well as work with Oracle on a non-Microsoft based network computer. This ongoing work led to what Mr. Gates characterized as a "critical meeting with Intel...." See Exhibit 14, Gates to Allchin and others, October 12, 1997. In planning for that meeting, Mr. Gates told other Microsoft executives that he wanted to "convince [Intel] that they need to stay away from Oracle NCs and work more closely with Microsoft." Id. He also discussed a powerful weapon Microsoft had to compel Intel to abandon its JAVA multimedia work, specifically the ability to ship Microsoft product in Sun byte codes. Microsoft knew that if it shipped its products in Sun byte code, it would directly undercut Intel's microprocessor business. As Mr. Gates himself wrote:

The idea here is that SUN byte codes **level the playing field for someone wanting to build a microprocessor** [Intel's business]. Instead having to test for hardcore compatibility with x86 [Intel product] which is very hard you just have to write a byte code

interpreter.

Id. at MS-BU 368895 (emphasis ours). That is, Microsoft could threaten to commoditize Intel's microprocessor business if Intel continued to work with Microsoft competitors on NCs. Id. (Writing of the upcoming meeting with Intel, Gates said **"I want them to understand that helping NC's and JAVA will push us to do Windows and other software in SUN byte codes...."**).

Just prior to the "critical meeting," Mr. Gates summarized Microsoft's position with Intel in two e-mails; one internal, and one sent to Intel's Andy Grove. In the internal mail, Mr. Gates said:

Two critical points:

1. **[W]e are in crisis mode with Intel. If they go ahead with their NC plans we certainly won't be working with them on Windows CE and most other things as well. Until I say so every conversation with Intel should say that you have been told that we are reevaluating all of our work with them based on their NC plans and what happened on the set top box issue.... My view is that if Intel thinks people are that cheap [to prefer non-Microsoft network computers to a PC] then we should make sure we support byte codes with all our software so that any processor can be used.**

See Exhibit 15, Gates to numerous Microsoft executives, October 14, 1997 (emphasis added).

Mr. Gates sent exactly this message directly to Andy Grove in an October 15, 1997, e-mail:

One thing I need some help on is to understand your tentative NC plans. Will Swoope came and presented a plan than had a \$500 to \$700 NC which were cheaper than the NetPC. We need to understand what hardware changes allow for the lower cost. The most demanding application – the biggest, the one that pages the most and grows the fastest is the browser. The PC can run diskless as well as any other device.

Our whole plan had been to tell people to write applications

assuming the latest Intel processor. Hydra because it has no local execution model does not encourage redirection of the industry to applications that don't push the processor. The load on the server uses up the chip power and with full compatibility the user moves up to a state of the art client. **However Intel seems now to think exposing APIs on cheap clients and directing development there is a good idea.** I need to understand this better.

This is fairly important for seeing if we can get back in sync or not.

One of the interesting things about NCs/JAVA is the byte codes. *The byte codes controlled by SUN will eliminate the compatibility problems of running software on different microprocessors.* We are assuming that someone at Intel has decided that it ok to endorse byte codes. We didn't think byte codes made sense but since the call from Gelsinger we have been looking at this a whole new way. I will discuss this next Wednesday. One breakthrough involves the ability to ship software in C, Visual Basic – all Microsoft software in byte codes very easily in the next 6 months.

See Exhibit 16 (emphasis added). This entire last paragraph is a delicate but very pointed threat: we have the ability to commoditize your business and will do so if you don't stop working with JAVA and non-Microsoft NC's. Microsoft's Jonathan Roberts captured it perfectly: "this is a great piece of mail. It is not a rant, but a very logical dissection of the issue with the threat of thermal nuclear war very well and politely delivered." Id. at MS-CC-BU 203589.

The day after receiving the Gates e-mail, Mr. Grove met privately with senior Intel executives. Later that afternoon, an Intel executive called Microsoft and told Microsoft that Intel had "agreed to 90% of what we [Microsoft] want." See Exhibit 17, Fox to Gates et al., October 16, 1997. Intel told Microsoft that Intel would no longer work on the non-Microsoft NC, and that it would not build a NC that would include a JAVA Virtual Machine. Id. at MS-CC-BU 368391. See also Adam Taylor to Bill Gates and others, October 16, 1997 ("Great work turning them [Intel] around... (with thx to bill's mail I suspect))." Id.

Several e-mails following this October meeting confirm the nature of the agreement reached. For example, on November 25, the magazine InfoWorld reported that Intel had licensed its JMF. Eric Rudder forwarded the report to Bill Gates, and told Mr. Gates:

i know you talked abt this w. gelsinger (intel); sad that intel is delivering "branded" java beans. even if they had a "commitment" this is still kind of an odd announcement....

See Exhibit 18, Eric Rudder to Bill Gates, November 25, 1997. Subsequent communications make clear the precise nature of the deal:

ericng [Engstrom] has done a deal with them [Intel] and we agreed that they could complete the work they were already doing. they are claiming this release was part of the deal with the partners and were obligated to do this. if that is eric's position also, then we cannot balk much except to say that we want to understand any/all other areas this will be coming in.

See Exhibit 19, Brumer to Stork et al., December 3, 1997. And as an e-mail from Intel to Microsoft confirmed:

Marshall, [m]y understanding of the original agreement was that we would stop new evangelism efforts, but would continue to support existing customer commitments. As far as I can tell, this is one of them.

See Exhibit 20, Russell Barck of Intel to Microsoft's Marshall Brumer, December 1, 1997.

Intel continued to reassure Microsoft that it was honoring its commitment into 1998.

See, e.g., Exhibit 21, Bob Herbold to Bill Gates and others, February 15, 1998 ("Charles Fitzgerald [Microsoft] is talking with Barbara Dawson of Intel on an almost daily basis and we seem to have good agreement here. As long as we are talking "native" with respect to JAVA, both parties are happy. **Dennis [of Intel] reiterated once again that the JAVA Media Framework activity between Sun and Intel is very very low priority and they expect it to die a natural death.**"). (Emphasis added).

This chronology makes plain that Mr. Gates was deeply and personally involved in precisely the period when Microsoft said otherwise. He obviously has “unique knowledge” and is a critically important Microsoft witness on Microsoft’s dealings with Intel.

B. Why This Matters To Burst.

This Intel episode is an important part of Burst’s case. Microsoft objected to Intel’s JAVA work precisely because Microsoft did not want independent software vendors (“ISV’s”) building on the Intel JMF platform. Burst was one ISV doing precisely that in 1997 and 1998. In 1998, Burst secured access to the Intel JMF source code, and released in spring 1998 a Burst Intel JAVA Media Framework (JMF) media player. This was one of the first products released early in a market subject to strong first mover effects, and precisely the type of product that Microsoft did not want.

When Intel announced in the summer of 1998 that it was abandoning its JMF platform, the agreement it reached with Microsoft, Burst understood that the Burst JMF player was likewise dead. No ISV builds on an abandoned platform. As a result, Burst changed direction and Burst product development, marketing and financing efforts were set back over a year. As a further consequence, toward the end of 1999, Burst built a “bridge” to the rapidly propagating Windows Media Player. That strategy, however, hit another Microsoft roadblock. Although Microsoft initially encouraged this work, in the spring 2000, Microsoft decided not to let the cross-platform Burst stream to a Windows Media Player.

III. THE NATURE OF THE EXAMINATION ITSELF WARRANTS ADDITIONAL TIME.

In striking the three hour compromise, this Court noted that the short time period would “discipline” the process. It did. Burst counsel moved as promptly and as efficiently as possible through the Intel documents and facts. However, often-times the witness seemed disinclined to

give a direct answer, requiring repeated questions, all of which consumed time and prevented counsel from moving on to other topics. We have attached the condensed transcript to this brief as Exhibit 22. But here is one example:

Burst counsel marked Mr. Brumer's mail to Mr. Gates that said "[a]t a high level, *we are most concerned that Intel is helping one of OUR strongest competitors* by supporting a scheme that allows first Windows to be replaced by Javasoft...." Counsel then asked Mr. Gates if *he* personally had that concern in 1997. Here is his answer:

Q: And did you personally share that concern in 1997, specifically, that Intel was helping one of Microsoft's strongest competitors?

MR. DOUGLAS: Objection to the form.

A: Intel's always had activities with our competitors. That's no surprise, if that's what you mean.

Q: It wasn't my question, Mr. Gates. My question was, were you concerned, you personally concerned, that Intel was helping one of Microsoft's strongest competitors?

MR. DOUGLAS: Same objection.

A: At all times we knew that Intel would be doing things with our competitors.

Q: Do you recall the question I asked, sir?

A: Uh-huh.

Q: Could you please answer it?

MR. DOUGLAS: Objection. You're just arguing with the witness. And, Mr. Gates, if you'd like to have your answer read back, the prior question and answer read back to determine whether there's anything else you can add, you may have that done as well.

Q: Would you like me to put my question again, sir?

A: Go ahead.

Q: I will. Mr. Gates, were you personally concerned in 1997 that Intel was helping one of Microsoft's strongest competitors?

MR. DOUGLAS: Objection. Form, plus asked and answered.

A: I'm not sure I know what you mean by concern. Intel worked with lots of software companies including Microsoft, a lot with Microsoft, and they did a lot with Microsoft's competitors at all times. So it wasn't a concern in the sense that we always expected that to be the case.

Q: So you're saying this is a concern that you personally did not have? Is that your testimony?

MR. DOUGLAS: Objection to the form.

A: I didn't expect that ever not to be the case. I did think that we could talk to Intel about what we thought would be helpful to Intel or would hurt Intel.

Q: Well, I'll ask my question one last time, sir.

Did you personally share the concern that Intel was helping one of Microsoft's strongest competitors? If you could answer that yes or no, I would appreciate it.

MR. DOUGLAS: Same objection.

A: Yeah, I think I've answered that.

Id. at 49:25-51:22.

This kind of colloquy has its virtues; it makes a point of the witnesses' non-responsiveness that the jury is likely to understand. However, with a fixed time limit, counsel's efforts to secure a direct answer consumed time that could have been spent on other subjects. Nor is this an isolated instance. See, e.g., Tr. at 84-85 (did Mr. Gates tell Intel that Microsoft would ship in byte codes if Intel continued to work on JAVA?); 95 (witness objecting to questions "skipping around," and Burst counsel going through portions of long e-mails, an

approach necessitated in part by the time limits imposed).

IV. THERE ARE SEVERAL CRITICAL TOPICS REMAINING.

Given the importance of the Intel examination, Burst did not have the opportunity to examine Mr. Gates on the following highly relevant topics:

- RealNetworks' contracts with Microsoft in 1997, whereby Microsoft attempted to secure RealNetworks' consent to forego competing in the multimedia platform space;
- Multimedia delivery and playback as a middleware platform potentially threatening the OS monopoly, a point that Microsoft hotly disputes in this case today; and
- E-mails that Mr. Gates personally received concerning Burst, its technology, and how Microsoft had used that technology in its Windows Media 9 "Corona" release;

These are important issues in this case, and issues on which Mr. Gates has direct, personal knowledge.

V. CONCLUSION.

For the reasons stated above, Burst respectfully requests leave to depose Mr. Gates for an additional two hours.

DATED: September 1, 2004

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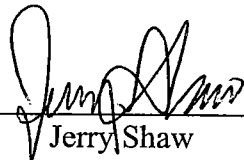
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Exhibits 1-22
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